Ontario

Final Report of the Agency Cluster Facilitator for the Municipal, Environment and Land Planning Tribunals

August 22, 2007

Agency Cluster Project
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The Honourable Gerry Phillips
Minister of Government Services

Dear Minister Phillips:

I am pleased to present my Final Report as the Agency Cluster Facilitator for the Municipal, Environment and Land Planning Tribunals.

The report sets out the progress of the Agency Cluster Project over the past year, from my initial discussions with the five Tribunals, their stakeholders and others in the tribunal sector, through consultations on the change initiatives I proposed in my Interim Report, to implementation.

This project demonstrates how clustering can enable tribunals to coordinate resources and collaborate on best practices, while safeguarding specialized expertise and tribunal independence. The initiatives being implemented by the five Tribunals – the Assessment Review Board, the Board of Negotiation, the Conservation Review Board, the Environmental Review Tribunal and the Ontario Municipal Board – include modern practices and approaches that I am confident others in Ontario's administrative justice community will also find useful in their efforts to deliver public service excellence.

Respectfully submitted,

Kevin Whitaker
Agency Cluster Facilitator

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1 EXECUTIVE SUMMARY

In September 2006, the government announced the Agency Cluster Project and the appointment of Kevin Whitaker (Chair of the Ontario Labour Relations Board, College Relations Commission and Education Relations Commission) as the Agency Cluster Facilitator to work with five Tribunals in the municipal, environment and land planning sector to find ways to improve services through cross-agency cooperation and coordination of operations, administration and dispute resolution services while respecting the unique roles and mandates of each. The Tribunals are: the Assessment Review Board, the Conservation Review Board, the Board of Negotiation, the Environmental Review Tribunal and the Ontario Municipal Board.

Following informal discussions with stakeholders and interested parties, the Facilitator released an Interim Report on January 31, 2007, setting out 16 options for operational, membership and procedural change for further focused feedback through written submissions.

The Facilitator received comments from a range of stakeholders, including bar associations, law firms, individual professionals, industry and professional associations and tribunals, both from within and beyond the sector. Generally, the submissions supported the clustering project and stated goals. A summary of the responses appears in this report.

Following this consultation, the Facilitator worked with the Tribunals to implement the change initiatives. Project governance and working groups comprised of the Tribunal Chairs, staff and legal counsel have been established and implementation is under way. At the release of this Final Report, the majority of the initiatives have either been accomplished, are in progress or the Tribunals have made commitments to complete implementation within identified timeframes.

The Agency Cluster Project has presented a unique opportunity to group together tribunals that operate in similar and related sectors to make the best use of common resources while strengthening the quality, consistency and accessibility of public services. The project has enabled identification of best practices that already exist and joint collaboration on new ones. Increased opportunities for interaction between the Tribunals will permit greater use of the full range of knowledge, skills and expertise inherent within the cluster. Implemented as a whole, the initiatives will culminate in continuous service improvement and adjudicative excellence.

This Final Report summarizes the project mandate, goals, principles and philosophy, reviews the consultation process and responses, details the 16 change initiatives and sets out accomplishments, next steps and conclusions.

2 WHAT THIS REPORT IS ABOUT

The Mandate

In September 2006, the Minister of Government Services announced the appointment of Kevin Whitaker as the Facilitator to lead the Agency Cluster Project for a one-year period. The Facilitator was asked to work with a group of five Tribunals in the municipal, environment and land planning sector to find ways to improve services through cross-agency cooperation and coordination of operations, administration and dispute resolution services.

This Final Report explains how the project was conducted, who was consulted, what change initiatives were proposed, progress to date and what is left to be done.

The Facilitator issued an Interim Report on January 31, 2007. The current Final Report incorporates much of the Interim Report to allow the document to be read and understood as a stand-alone text.

The project was guided by the following principles:

1. The independence of Tribunal adjudication and decision making will be protected and enhanced.

2. The legislative mandates of the Tribunals will be respected.

3. Legislative changes may be proposed if necessary to achieve cluster objectives.

4. Users will find the Tribunals easier to understand and navigate.

5. Innovations will be transparent and supported by clear and appropriate accountability for outcomes.

6. Resources will be focused on delivering high quality adjudicative services.

7. Access to justice and the protection of the public interest will not be compromised.

The five Tribunals participating in the project are:

- The Assessment Review Board (ARB)
- The Board of Negotiation (BON)
- The Conservation Review Board (CRB)
- The Environmental Review Tribunal (ERT)
- The Ontario Municipal Board (OMB).

These are referred to as the "Tribunals".

2 WHAT THIS REPORT IS ABOUT

What is Clustering?

Clustering is the grouping together of different tribunals that work in related areas and deal with related subject matter. The broad goal of clustering is to improve the quality of services offered to the public by sharing resources, expertise and administrative and professional support.

More specifically, clustering is a mechanism that is intended to safeguard the retention and development of the unique areas of expertise within each tribunal while at the same time permitting the sharing of best practices within the cluster. Clustering is not the merging or integration of different tribunals into one generic agency.

Clustered tribunals can share a wide range of best practices. The determination of what is appropriate to share is left to each individual tribunal. These best practices can range from dispute resolution processes to case management and internal tribunal governance. What is critical is that the sharing or alignment of services should be done in a way that permits the continuing use and application of each tribunal's particular area of expertise.

One of the greatest challenges facing administrative tribunals and governments in general is the question of how to best coordinate and deploy scarce public resources while at the same time ensuring the retention of specialized expertise and tribunal independence. Increasingly, clustering is understood as an effective and appropriate way of addressing this challenge.

While clustering is intended to result in a more effective use of existing resources, it is not an exercise designed to cut costs or "rationalize" levels of service. There are no savings targeted simply as a consequence of clustering alone. The initiatives that follow are designed to make the most of the pool of resources currently committed to the Tribunals.

The principal question that has guided the work is this: how can the Tribunals, by working together, use their existing pool of resources to provide the highest levels of public service while strengthening individual Tribunal mandates?

While each Tribunal has its own distinct way of doing things, there are a wide variety of functions and tasks performed similarly and for common reasons. In certain areas, these commonly performed tasks can be harmonized to render public services more simple and accessible. By harmonizing certain practices and functions that are performed in common, the ability of users to understand and fully participate in Tribunal processes is enhanced.

This objective can be accomplished in ways that do not detract from the application of particular forms of expertise. Best practices can be identified within the Tribunals and then each agency is free to adopt or modify the practices to conform to their particular and unique requirements. Most importantly, the choices to be made about what is done in common or differently are the choices of each Tribunal according to its own needs.

This exercise is not in any way a performance review or critique of individual Tribunals. It is not a compilation of deficiencies or the generation of a checklist of things that must be done to improve levels of service. The fact that a particular practice is proposed for adoption by all Tribunals is not a criticism of any one Tribunal. It does not mean that the practice is unknown within one or more of the Tribunals.

Some of the initiatives included in this report represent long-standing practices in some but not all of the Tribunals. These are being proposed now as suggested common best practices because it has been concluded that all Tribunals would benefit from their adoption without risk that individual mandates or expertise would be compromised.

2 WHAT THIS REPORT IS ABOUT

The Broader Picture

This project occurs on the larger landscape of the administrative justice system. There is a wide range of tribunals and agencies that operate in different sectors and areas of law in Ontario and across the country. These are the agencies of government that enforce legal rights and obligations and resolve disputes outside of the courts.

There has been a great expansion of the administrative justice system in the last two decades. Much of the work that used to be done by the courts has devolved to tribunals. In 2007, most Ontarians interact far more frequently with the administrative justice system than the courts. It is understood to be the principal "justice portal" for most people. This trend is only likely to accelerate in the future.

As the Tribunals are a significant and important part of the broader administrative justice community, this project was informed by a set of principles and assumptions that are considered to be mainstream and normative within the administrative justice community. These assumptions deal in part with accepted notions of appropriate standards of services and how they are to be achieved.

Perhaps the most fundamental assumption about the appropriate delivery of administrative justice dispute resolution deals with the central concept of expertise. Unlike judges who are generalists and must deal with any and all areas of law that might come before them, tribunals and tribunal adjudicators are expressly understood to be experts in their particular field or sector.

Tribunals and the courts, when reviewing tribunal decisions, accept that administrative justice adjudication in particular subject areas and sectors is best provided by persons who are expert and experienced in that particular sector or area of law. Further, it is assumed that these experts will be recruited from the very communities that use the services of a particular tribunal. It is accepted that adjudicators who come from user communities will know and understand the culture and needs of those communities. It is this expertise, brought to the dispute resolution process, which in turn permits tribunals to appropriately and legitimately exercise considerable discretion leading to quick and effective outcomes.

The recognition and use of expertise in problem solving permits a nimble form of dispute resolution in which the formality of court-like processes and rules may be dispensed with. Expert decision makers come to a problem with a developed understanding of what needs to be done to resolve the dispute. Processes can be tailored and modified to fit the particular circumstances of the dispute.

There is a growing consensus within the administrative justice community about how this more nimble form of adjudication should be structured. Most importantly, the building block principles are fairness, accessibility, pragmatism and expedition. Accessibility includes cost, both to the parties privately and to government in terms of the cost to deliver and provide the services.

Features of a Modern Tribunal

A significant component of the project included assessing existing processes and practices within the Tribunals. In order to consider and assess the utility of these practices it is useful to set them against a catalogue of the more generic features which most in the administrative justice community would agree are the features of a modern tribunal. To the extent that these features describe the Tribunals in the project, their practices might usefully and for good purposes, be shared with other tribunals.

The following list describes the most significant features of a modern tribunal:

- Hearing days are kept to a minimum
- Opportunities for mediation are maximized
- The use of appropriate alternatives to traditional civil trial-like dispute resolution processes are maximized
- Disposition times are reduced
- Decision writing time is reduced
- The utility of administrative and professional support is maximized
- Decision makers and mediators within a tribunal share and apply a consistent set of views on all major issues of law and policy
- Tribunal users are treated similarly and in a uniform fashion by tribunals who provide services in similar areas
- Consistency of outcome is enhanced because decisions are seen and understood by the parties and the courts to be legitimate, fair and final
- Tribunal practices are transparent and justified
- Interaction and dialogue between the tribunal and user communities are encouraged
- Hearings are conducted in a fair and efficient manner
- Decisions are well reasoned, well written and issued in a timely manner.

With this set of background assumptions and understanding of tribunal performance, a consultation process was designed to elicit the views of stakeholders and the Tribunals themselves about how these features could be enhanced within the Tribunals. As described below, this process was quite focused. A cross-section of representative stakeholders was asked to comment on specific proposed initiatives.

3 THE PARTICIPATING TRIBUNALS

Each of the five Tribunals exercises unique jurisdictions. What follows in this section is a brief overview of the significant individual features of each Tribunal.

Ontario Municipal Board (OMB)

The OMB is the oldest tribunal and exercises the broadest statutory mandate. The Board hears appeals and applications on a wide range of municipal and land-related matters, including official plans, zoning by-laws, subdivision plans, consents and minor variances, land compensation, development charges, ward boundaries and aggregate resources. The OMB also has a Memorandum of Understanding with the CRB for the appointment of CRB members to OMB panels for appeals under the *Ontario Heritage Act*.

The OMB deals with about 2,000 new files each year of which approximately one third, and the largest category, are minor variance issues. Almost 80 per cent of OMB matters are heard in one day or less.

The OMB operates with 54 staff and 27 full-time appointees.

Assessment Review Board (ARB)

The ARB adjudicates property assessment and tax appeals. The Board's general jurisdiction and authority arises principally from the *Assessment Review Board Act*. Jurisdiction in assessment appeal matters arises from the *Assessment Act*, while jurisdiction in tax appeal matters arises from the *Municipal Act, 2001* and the *City of Toronto Act, 2006*.

The ARB has a caseload that varies from about 12,000 to 80,000 applications a year depending largely on the reassessment year cycle. This large fluctuation in yearly volume presents particular case management challenges. The majority (up to 60 per cent) of appeals involve less complex residential disputes, with the balance being commercial and industrial. These two types of cases are streamed, each with an appropriate case management treatment. Approximately 95 per cent of hearings are conducted in one day or less. Frequently, hearings take less than two hours with an oral decision rendered at the end of the hearing and a brief written decision following shortly thereafter.

The ARB operates with approximately 75 staff, four full-time appointees and about 40 part-time appointees.

Board of Negotiation (BON)

The Board of Negotiation deals with compensation disputes arising from land expropriation. The BON does not adjudicate disputes but rather assists in negotiating settlements.

The BON deals with roughly 35 disputes a year and is staffed and managed from within the OMB. The Chair of the OMB is cross-appointed as Chair of the BON while support services are provided by staff from the OMB and ARB. All appointees are part-time and are not cross-appointed to the OMB.

The OMB, ARB and BON report to the Attorney General.

Environmental Review Tribunal (ERT)

The ERT deals with a range of environmental disputes arising from 10 different statutory schemes. The greatest number of disputes arise under the *Niagara Escarpment Planning and Development Act*, followed by the *Environmental Protection Act*. The ERT is also responsible for administering the Consolidated Hearings Act, under which joint boards are convened with the OMB.

The ERT wears three hats – as the ERT, as the Niagara Escarpment Hearing Office and as the Office of Consolidated Hearings. The ERT was established in 2000 as an amalgamation of the former Environmental Assessment Board and the Environmental Appeal Board. It receives about 150 new applications and appeals each year. Applications and appeals are streamed into tracks and receive specialized case management dependent on the track.

The ERT operates with approximately nine staff, six full-time and six part-time appointees. The Chair and Vice-Chairs are full-time, and member appointees are part-time.

The ERT reports to the Minister of the Environment.

Conservation Review Board (CRB)

The CRB deals with disputes concerning the designation of heritage status properties by municipalities. The CRB also deals with the designation and licensing of archeological sites. Hearings are held to determine whether to recommend the acceptance or rejection of a designation. The decisions of the CRB are advisory only and not binding.

The CRB has approximately 12-18 new cases filed each year and typically takes one day to dispose of each case. The CRB's administrative staff and office support is provided directly by the Ministry of Culture. There are nine part-time appointees, including the Chair.

The CRB reports to the Minister of Culture.

Comparative Features

It is useful to consider the comparative features of the Tribunals as a group. This comparative assessment summary is divided into four categories: case management, current physical space and organizational structures, adjudicator management and hearing processes.

Case Management

The ARB, OMB and ERT each have distinct, "stand-alone", custom-built case management systems based on different technology platforms.

The OMB and ARB each have distinct case management processes and streaming practices based on distinct sets of criteria. The OMB has a comprehensive series of case management protocols in place.

The ERT has a series of case management processes and practices that are subject matter and legislation specific. The CRB case management process is performed manually due to the small caseload.

3 THE PARTICIPATING TRIBUNALS

The ARB, OMB, ERT and CRB each have separate Rules of Practice and Procedure with many common features.

While each Tribunal offers mediation to varying degrees, most matters are not mediated in any of the Tribunals. If mediation is attempted, it occurs generally after a pre-hearing conference. With the exception of the ERT, where the Vice-Chairs have extensive Alternate Dispute Resolution (ADR) training and experience, mediation is provided by adjudicators who have received some limited training for this purpose. The OMB is currently embarking on developing a comprehensive mediation program.

The ARB, OMB, BON and ERT each have their own websites, with varying degrees of access to information, guides, procedures e-services and case tracking and status information. Both the ARB and the ERT currently provide e-filing facilities. E-filing represents 30 per cent of the ARB's caseload intake. The CRB has a presence on the Ministry of Culture website.

Current Physical Space and Organizational Structures

The OMB, BON and ARB share the same physical space at 655 Bay Street in Toronto. The OMB and the BON are located on the 15th and 16th floors and the ARB is on the 11th and 12th floors. The OMB and ARB are organized into five identical but separate departments (Communications, Business Planning and Corporate Services, Controllership and Finance, Information Technology, Case Management) reporting to the CEO. The CEO and most department heads have dual reporting relationships and responsibilities to both boards. The OMB and ARB have separate legal counsel, libraries, file rooms, mail rooms and reception and, for all purposes, function as separate and distinct organizations.

The ERT is currently located at 2300 Yonge Street in Toronto. Its structure is similar to the OMB, BON and ARB, though on a much smaller scale, with in-house Registrar, Legal, Information Technology, Case Management and Reception support services

The CRB currently has no dedicated physical space.

Adjudicator Management

The ARB has position descriptions in place for the functions of the Chair, Vice-Chairs and members. Training for members consists of the Society of Ontario Adjudicators and Regulators (SOAR) programs, internal mentoring and regular and ad hoc regional training sessions. The Board also runs a week-long new members training program and has a well established Members Education Committee which meets monthly.

The OMB has position descriptions in place for the Chair, Vice-Chairs, and members. Annual performance reviews are conducted for all members and include reviews of the conduct of hearings and decisions as well as development and learning plans. A continuous education committee exists and programs include SOAR, ad hoc and regular annual programs. A series of internal committees with membership from appointees and department heads have been established for Quality Assurance, ADR, Professional Development, Rules, Technology and Case Management.

The ERT has position descriptions for adjudicators and conducts competency-based performance reviews within six months of appointment for new members and annually for all members. For new members, there is a formal training program at the ERT in addition to SOAR training. Vice-Chairs also receive Stitt Feld Handy ADR and advanced ADR training. For all members, there is an internal mentoring, regular ad hoc workshops and planned learning programs.

The CRB does not have adjudicator position descriptions. Training consists of SOAR and ad hoc programs.

Hearing Processes

The OMB, ARB and ERT exercise similar forms of statutory powers and adjudicate with similar rules and procedural practices. Although non-binding and advisory, CRB hearings closely resemble hearings conducted by the OMB, ARB and ERT. The BON does not conduct hearings.

There is an overlap between users and members of the Bar who appear before the Tribunals. Self-represented parties usually appear on a specific matter and generally do not appear before multiple Tribunals. Appointees to all the Tribunals are traditionally recruited from within a broad but common community of users and counsel.

The Tribunals run and administer similar hearing processes. All are governed by the *Statutory Powers Procedure Act*.

The OMB, ARB and ERT are, in the process of adjudication, entitled and required to make findings and conclusions of law and fact.

As previously noted, the Tribunals all offer some form of non-mandatory mediation conducted mainly by adjudicators who have been provided with varying degrees of mediation training.

While some of the Tribunals are entitled in some matters to conduct written or electronic hearings, most hearings are conducted in face-to-face sessions with parties.

With the exception of the BON, the Tribunals generally resolve disputes by way of final adjudication with reasons, following a civil trial-like hearing process.

Most decision making requires the exercise of discretion and draws on the expertise of the adjudicator.

The OMB, ARB and ERT stream cases on the basis of type of application and complexity. These tribunals use different case management protocols depending on whether a particular dispute is identified as simple or complex.

Final decisions of the Tribunals are subject to either appeal or judicial review. On review or appeal, the courts extend some degree of deference to the Tribunals in recognition of subject matter expertise and the quality of adjudication.

While the OMB, the ARB and the ERT each publish and administer their own Rules of Practice and Procedure, they contain common elements.

4 CONSULTATION AND RESPONSES

Preliminary Consultations

Between September 1, 2006 and January 15, 2007, the Facilitator met and informally consulted with a broad range of municipal, environmental and land planning stakeholders, including:

- Tribunal Chairs, adjudicators, senior managers and legal counsel
- Canadian Bar Association Municipal and Environmental Section Executive members
- Private counsel and law firms identified by the Tribunals
- Institutional parties who appear regularly before the Tribunals
- Trade, industry and professional associations that represent the interests of parties who appear before the Tribunals
- Administrative law academics.

The Facilitator was interested primarily in individual or institutional responses to suggestions or ideas related to the clustering exercise rather than general observations about whether the Tribunals were performing well or poorly. To that extent, the options for change subsequently set out in the Interim Report did not reflect an assessment of current performance but rather, taking into consideration the comments received, proposed initiatives that would enable the five Tribunals to benefit from a particular practice and collaboratively work towards the development of best practices.

The Interim Report

On January 31, 2007, the Facilitator's Interim Report was broadly released, including over 50 direct mailings to those consulted in the preliminary phase and a downloadable posting on the Ministry of Government Services' website with links from the Tribunals' websites. Interested parties were invited to respond to the report with written submissions by February 28, 2007.

The Interim Report set out a series of 16 options for operational, membership and procedural change, for further focused feedback. A total of 14 written submissions were received in response, including submissions from the Ontario Bar Association (Municipal and Environmental Law sections), Niagara Escarpment Commission, Canadian Environmental Law Association, Ontario Professional Planners Institute, Ontario Expropriation Association, Municipal Property Assessment Corporation, Ontario Special Education (English) Tribunal, a law firm, a property tax advisor, ARB members and the ERT.

Generally, the submissions supported the clustering project and stated goals. No responses raised major concerns with proceeding on any of the 16 proposed options for change.

Options for Change and Consultation Response

The following describes the options proposed and responses received through the Interim Report consultation. These options were developed in large measure to achieve or obtain the "modern" tribunal features discussed earlier, across the cluster.

Operational Change

The suggested options for operational change focus on the degree to which some services, either provided or used by the Tribunals, can be offered in a shared fashion. These proposals were perhaps the most critical in the Interim Report and are at the heart of the clustering exercise. Shared services will ensure the existing pool of resources within the Tribunals are used to maximum effect. The coordination of the delivery of services will create a simpler, more accessible interface for public use. These outcomes are consistent with "modern" tribunal features, maximizing the utility of professional and administrative support.

1. The Tribunals should consider co-location for purposes of sharing the same physical space to provide one access portal for the public.

The Tribunals could share a physical space. In a single location, the Tribunals could share common office space and administrative services. These could include: reception, security, library, mail room, printing, file storage, hearing rooms and facilities for electronic and teleconference hearings. The governance structure and the details of the shared services arrangements would need to be determined.

2. The Tribunals should consider adopting one single web access portal for "virtual" co-location.

Virtual co-location would provide a simpler and more accessible source of information and guidance for the public. Information technology and communications expertise could be pooled in order to simplify public access to forms, publications and decisions. E-filing and public monitoring status could be extended from some to all Tribunals.

3. Once co-located, the Tribunals should consider sharing operational units that provide similar and consistent types of different professional, administrative and support services.

The Tribunals could share a full range of support services within the same physical location. These could include operational units providing legal services, planning expertise, mediation services, communications, training and education, administrator and adjudicator support. Shared services permit greater flexibility, efficiency and access to expertise within existing resources. This will lend particular assistance to those Tribunals that experience significant fluctuating caseloads.

Responses Regarding Operational Change:

- Overall good support and general recognition of potential efficiencies in sharing services. A few respondents questioned the degree of overlap between the Tribunals and improved access for users through clustering.
- Clustering should not result in the dilution of individual Tribunal specialized knowledge and expertise. Services should continue to meet client specific needs.
- Clustering should not result in deferrals of current ongoing service improvements in individual Tribunals.
- Website re-design should ensure ease of recognition and easy navigation to individual Tribunals without confusion regarding respective jurisdictions.

Membership Change

Options for membership change were intended to enhance training, the acquisition and maintenance of adjudication and mediation skills and abilities, and generally the quality and consistency of dispute resolution outcomes. These options were also responsive to the government's expressed intention to promote the "professionalization" of adjudication within the Ontario Public Service and should assist in reducing the number of hearing days, disposition and writing time. Consistency of treatment and outcome for similarly situated parties will also be enhanced. These outcomes are consistent with "modern" tribunal features.

4. The Tribunals should consider moving over time to an adjudicator model that is mainly full-time as opposed to part-time.

The work of the Tribunals should be the first and primary responsibility for adjudicators. The Tribunals should be able to schedule and assign work to adjudicators on a Monday to Friday basis during normal office hours and to expect and require adjudicator attendance at training and committee meetings. These objectives are difficult to obtain in situations where adjudicators are appointed on a part-time basis and have duties, responsibilities and priorities other than the work of the Tribunals.

Part-time appointees would continue to be appropriate where there is a demonstrated need that cannot be met through a full-time appointment – for example to obtain particular forms of expertise or skill sets, to meet regional or other particular representational demands or to support significant fluctuations in caseloads.

Full-time appointments are more appropriate for purposes of quality control and are consistent with the government's broader objective of creating a complement of full-time professional adjudicator appointees within the Ontario Public Service.

5. The Tribunals should consider the development of position descriptions in a standardized format for adjudicators and Chairs.

Position descriptions used in tandem with core competencies would enhance the Tribunals' ability to recruit, train and assess adjudicators. Position descriptions aid recruitment and inform interested applicants of the duties and qualifications required for the position. They would bring consistency in nomenclature and requirements across the Tribunals among similar positions.

6. The Tribunals should consider the development of a written set of core competencies for adjudicators and Chairs.

Written core competencies should be developed using a standardized format. While there would continue to be certain skills and knowledge that are unique to each Tribunal, there are also at a general level, a number of competencies that are shared across the Tribunals. Increasingly, the development and use of written core competencies are understood to be part of best practices in any tribunal across the administrative justice system.

Core competencies would further assist in recruiting, assessing and developing adjudicators by describing how the required skills, qualifications and behaviours are used for effective performance in the position. Core competencies could therefore be used to appropriately assess and enhance member performance through development while in the position. Core competencies could assist in ensuring consistent quality in decision writing, expertise, hearing management and the appropriate adjudicator skill set.

7. The Tribunals should consider the adoption of a uniform Code of Conduct.

A uniform Code of Conduct would provide needed direction to adjudicators who may be administering a greater and more challenging array of processes and procedures and will strengthen the integrity of the cluster as a whole. The development of a Code of Conduct is recognized across the Ontario government and in other jurisdictions as a critical component of tribunal best practices.

8. The Tribunals should consider the adoption of written protocols for the recruitment and assessment of adjudicators.

Certainty around how adjudicators are recruited within the tribunals and assessed once in the position would further enhance the ability of the Tribunals to control the quality of adjudication. Certainty around adjudicator assessment would also enhance the professionalism and accountability of Tribunal members. Tribunal protocols for adjudicator recruitment contribute to the legitimacy of the process.

9. The Tribunals should consider the adoption of a common and formalized adjudicator training program.

Current training is mixed and informal across the Tribunals. While training tailored to the particular expertise and subject matter of each Tribunal would continue to be appropriately delivered by each Tribunal to its own adjudicators, there are broad areas of required skills and competencies that are shared across the Tribunals. Common and regularized training could be provided in these latter areas. The pooling of training resources may allow better access for the smaller Tribunals and more opportunities to meet specific training needs. Analysis of individual members' core competencies can augment internal opportunities and would not only recognize excellence of individual members but also further enhance consistency among similar duties and skills.

Responses Regarding Membership Change:

- Moving, over time, to a mainly full-time adjudicator model was well supported with a general recognition that some part-time adjudicators will continue to be required for specific types of expertise and fluctuating caseloads.
- General agreement and support for the initiatives regarding position descriptions, core competencies and code of conduct. The generic tools under development by the Agency Modernization Advisory Council should be adopted as best suited to the Tribunals rather than creating new ones.
- Support for both common core skills training and specialized Tribunal-specific training approaches as part of a formalized adjudicator training program.

Procedural Change

Options for procedural change are driven by the need to take maximum advantage of the entire range of flexible practices and procedures now available to administrative tribunals. At the same time, these should be as simple and consistent as possible so as to ensure public understanding and accessibility. These proposed changes promote both transparency of operation and consistency. Mediation and other alternative dispute resolution opportunities are also maximized.

10. The Tribunals should consider taking steps to harmonize those portions of their Rules of Practice and Procedure which are of general application and not specifically tied to particular statutory regimes. These Rules of general application should be described and explained in appropriate Practice Directions and Information Bulletins.

The Tribunals should consider the adoption of one set of General Rules of Practice and Procedure to deal with matters of process that are not necessarily tied to a particular statutory scheme. There are and would remain certain Rules that are unique and specific to each Tribunal. General and shared Rules would remain subject to those specific Rules as required by legislation or regulation. The use of practice directions, notices to the community and information bulletins would assist in managing community expectations around issues of practice and procedure.

11. The Tribunals should consider adopting the practice that all written decisions be reviewed by the Chair, Vice-Chairs or Counsel to the Chair for adherence to style and format.

For purposes of quality control, it is an accepted practice within the administrative justice system for Chairs to establish some form of decision review to ensure consistency of style, form and the expression of reasoning. Like many of the proposed options for change, this practice already occurs to different degrees within the Tribunals.

Consistent decision review does not deal with the content of the decision or the outcome and in this way does not compromise the independence of the individual decision maker.

12. Chairs should exercise clear and primary responsibility for the assignment of panels of adjudicators.

The assignment of work by the Chair reinforces and strengthens the reporting relationship between adjudicators and the Chair. Although some aspects of case assignment can be appropriately delegated to senior tribunal staff, the Chair should retain final control over the assignment of cases to adjudicators and panels.

13. The Tribunals should consider the use of a commonly shared mediation unit whose primary skill set is mediation.

While each of the Tribunals offers mediation to varying degrees, there are significant opportunities for the use of persons deployed as mediators, with that being their primary skill set.

14. The Tribunals should consider in appropriate cases the assignment of mediators early in the case management process.

While mandatory mediation is not recommended, the expectation that parties should be prepared to participate in mediation in the normal course is becoming a standard feature of contemporary tribunal best practices.

There are some types of disputes where early mediation may not be appropriate – for example where overriding public interest, rights-based and multi-party issues could necessarily limit the scope of mediation. Where it is appropriate, however, the increased use of early mediation could significantly free up and redirect resources now used for scheduling and conducting hearings.

15. Tribunals should encourage and facilitate regular meetings and discussions amongst adjudicators to deal with issues of policy, law and practice.

Balanced against the principle that "she who hears decides" is the principle that similarly situated parties should receive comparable and consistent adjudicative outcomes. This is only possible in a tribunal that encourages a culture of internal communication to deal with issues of practice, policy and discretion.

Tribunals should be designed in a manner that facilitates and promotes interaction between adjudicators and staff so that there are regular opportunities to discuss and reflect on the work of the tribunal. While this goal is particularly challenging in tribunals with regional or part-time adjudicators, this is usually where the need for this type of process is even more critically important. Adjudicators should be encouraged and supported in their discussions and exchanges with colleagues. Decisions that change or run counter to established understandings should be discussed internally before release.

16. Tribunals should consider the establishment of a common Community Advisory Committee.

A Community Advisory Committee is comprised of persons who use the services of the Tribunal and provides advice and feedback to the Tribunal about its operations. Some of the Tribunals already use such a forum. The establishment of such a committee is understood to be a tribunal best practice.

There will be common and shared issues that will be of concern to the broader community of users and counsel who appear before all the participating Tribunals. While individual Tribunals should continue their own committees, there would be value in having a commonly shared forum to deal with issues affecting all Tribunals.

Responses Regarding Procedural Change:

- General support for the options regarding rules harmonization and written decision review. A few respondents noted the need to recognize ARB case volumes and unrepresented parties in a rules review. Consistency and objectivity in decision making are seen as important.
- Regarding the options for a shared mediation unit and the earlier assignment of mediators, responses noted that subject matter expertise is seen as important in effective mediation. Early mediation may not be suitable in some cases, particularly public interests cases, and may be limited in scope by statute or process in others.
- General support for a common Community Advisory Committee provided that its scope and mandate are clearly defined. Retaining the existing Tribunal-specific advisory committees in addition to a common committee was encouraged.

5 IMPLEMENTATION APPROACH

Project Governance and Implementation

Following consideration of written submissions in response to the Interim Report, the 16 options for change were proposed as change initiatives and the Facilitator began working with the Tribunals to implement them. A planning, implementation and oversight governance structure was established which included an oversight and guidance table comprised of the Tribunal Chairs, and a transition team responsible for implementing the initiatives comprised of Tribunal representatives. A legal working group was also established to focus on the rules harmonization and written decision review initiatives.

A comprehensive project plan and timeframes for implementation have been established, which the Chairs and the transition team will continue to use in working together to complete the initiatives.

The Agency Modernization Advisory Council

In September 2006, the Minister of Government Services appointed an Agency Modernization Advisory Council to provide advice on the development of tools to support and enhance the governance of agencies and the expertise of agency appointees. The Council also acted as a sounding board for the Agency Cluster Facilitator.

The Council recently released a suite of governance tools that include generic position descriptions, core competencies, codes of conduct and learning and development maps. The tools have been adopted as a starting point for the Tribunals' membership change initiatives regarding standardized position descriptions and core competencies and a uniform code of conduct.

6 ACCOMPLISHMENTS AND NEXT STEPS

At the point of the release of this Final Report, the majority of initiatives have either been accomplished, are in progress or the Tribunals have made commitments to complete implementation within identified timeframes.

The two most important initiatives – the physical and virtual co-location of the Tribunals – are anticipated to occur before the end of the 2007. These initiatives will permit the Tribunals to interact with each other on a day-to-day basis and strengthen the institutional ties that make up the fabric of the cluster. Users will be able to more readily identify the Tribunals as related entities, enhancing transparency and perceived consistency. Physical proximity will facilitate discussion and collaboration on a wide range of professional and administrative services. Progress on all project initiatives will be enhanced and expedited by co-location.

What follows is a description of the progress made regarding each of the 16 initiatives and suggestions as to how to move each one forward.

Operational Change

1. Physical Co-Location

The most significant initiative is that the Tribunals co-locate to share common physical space. This will permit a sharing of public and administrative back-office space including library and hearing rooms. Perhaps even more importantly, this will create opportunities for the day-to-day interaction of adjudicators and staff within the different Tribunals. This type of interaction allows for and fosters the discussion, comparison and sharing of techniques, expertise and knowledge.

The OMB, ARB and BON currently occupy joint space at 655 Bay Street in Toronto. In the winter of 2007, the ERT and the CRB will move into this space so that all Tribunals will be physically co-located. Over the fall, this space will be modified and refitted to accommodate all five agencies. Once co-located, all Tribunals will share common space to be used for public reception, hearing rooms, mail room and library.

It is anticipated that this initiative will be completed by the end of the 2007 calendar year.

2. Virtual Co-Location

Virtual co-location refers to the joint adoption of one single website for the clustered Tribunals and the pooling of information technology and communications expertise and services.

By the end of 2007, it is anticipated that all tribunals will share a common website and will use a common information technology platform. The common website will continue to maintain separate identities for each Tribunal and easy navigation to individual Tribunals.

It is anticipated that this initiative will be completed by the end of the 2007 calendar year.

3. Sharing Operational Units

The transition team is in the process of identifying different areas of operational, administrative and professional areas where expertise can be pooled and shared. Once identified, shared services agreements will be made between Tribunals that will describe the degree of service integration and how costs are to be apportioned. It is anticipated that there will be different shared services agreements within the cluster as some services will only be appropriately provided in common between some but not all of the Tribunals.

This is anticipated to be completed by the end of the 2007 calendar year.

In the future, the Tribunals could work towards sharing appropriate technologies and infrastructure while maintaining appropriate security and privacy protection. Currently there is a broad range of different case management systems. Despite the differences in file content and actions, the Tribunals could work towards the development of a common file management system.

Membership Change

4. Mainly Full-Time Adjudicator Model

The OMB consists entirely of full-time members. The ARB, BON, CRB and the ERT have historically relied to varying degrees on part-time members. In some cases, the Chair and Vice-Chairs are the only full-time appointments.

The ARB is preparing to proceed with appointments of additional new full-time members. There still remains a high proportion of part-time members at the ARB, the CRB and the ERT.

Consideration should be given to cross-appointment of CRB and OMB members in order to ensure that qualified CRB adjudicators with appropriate heritage expertise would be available on a full-time basis to meet any extraordinary hearing requirements.

Work continues to increase the ratio of full-time to part-time appointees. As long as there remain sufficient part-time members to satisfy workload fluctuations, regional service needs and any statutory requirements, there is no opposition within the Tribunals to increasing the complement of full-time members.

There would seem to be agreement that, in general, full-time membership provides for a more efficient and effective deployment of adjudicator resources. The next steps would include developing full-time complement targets and recruitment plans for ministerial approval and, subject to approval, the conversion to a greater number of full-time appointees would proceed over time as appointments expire.

The development of targets and plans is anticipated to be completed by the end of the 2007 calendar year.

5. Standardized Position Descriptions for Adjudicators and Chairs

6. Standardized Written Core Competencies for Adjudicators and Chairs

7. Uniform Code of Conduct for Adjudicators and Chairs

The Tribunal Chairs agreed to use the Agency Modernization Advisory Council generic position descriptions, core competencies and code of conduct to adapt as best suited to their respective Tribunal, using the common formats.

These initiatives are completed.

8. Written Protocols for Recruitment and Assessment of Adjudicators

The Tribunal Chairs agree that this is an important initiative that will be enhanced by the adoption, with necessary modifications, to the individual Tribunals, of the common position descriptions, core competencies and code of conduct recently developed by the Agency Modernization Advisory Council. Each Tribunal will develop or update its own recruitment and assessment protocols within this context and within the context of the Public Appointments Secretariat's appointments process.

This initiative is anticipated to be completed in 2008.

9. Common Adjudicator Training Program

The OMB and ARB have agreed to work together on developing common training components for their adjudicator training programs. The ERT and CRB will make an assessment as to the degree of their participation.

The OMB and the ARB will take the lead to explore establishing a coordinator of training who will be available to supervise, monitor and provide training to all Tribunals as they deem necessary.

This is anticipated to be completed in 2008.

In addition to the above noted governance tools, the Agency Modernization Advisory Council has also developed competency-based learning and development maps. These generic tools are designed to support individual adjudicator training. The Facilitator highly recommends that the Tribunals adopt these tools to support their ongoing identification and development of training opportunities.

Procedural Change

10. Harmonized Rules of Practice

Counsel for the Tribunals are working together to harmonize those portions of their different Rules of Practice and Procedure that deal with general matters and are not specifically tied to any particular statutory scheme.

Communications and directions to the various user communities will be varied accordingly.

The Tribunals are in the process of collaboratively identifying a grouping of common rules that are of general application. These will be incorporated into their respective Rules by the end of the 2007 calendar year. The Facilitator strongly recommends that a broader harmonization review of Rules across the Tribunals be initiated after the current review processes are completed.

11. Decision Review Protocols

The Tribunals have now all adopted comprehensive decision review protocols to ensure that decisions are consistently reviewed prior to issuance. These practices have been catalogued and shared within the Tribunals.

This initiative is completed.

12. Chairs Responsible for Assignment of Adjudicators

The Tribunals have all confirmed that Chairs exercise primary authority in the assignment of adjudicators.

This initiative is completed.

13. Common Mediation Unit

14. Early Mediation

One of the most significant developments coming out of the project is a rethinking of the use of mediation by some of the Tribunals. The regular and routine resolution of disputes by mediation as opposed to adjudication is now considered to be normative or mainstream across the administrative justice system generally. Dispute resolution outcomes are enhanced when the parties are able to come to agreement on results with certainty of outcome, tailored to the unique needs of the particular type of case.

While each of the Tribunals has to this point offered some form of mediation to parties, it has not been regularly or routinely incorporated into case management processes. This has been the subject of much discussion throughout this review process and the Facilitator has encouraged the Tribunals to re-examine their use of mediation – particularly early mediation.

As a result, the use of mediation by the Tribunals is now changing. The Tribunals are now in agreement that the increased use of mediation can assist in the early resolution of cases provided mediators have the necessary subject matter expertise.

The OMB in particular has taken the lead by retaining consultants to obtain direction and advice in order to enhance its ability to provide mediation services. The OMB has already begun to expand the use of mediation to a much broader range of disputes.

The OMB's expanded use of mediation and its consultants' report, should serve as a platform for an increasing emphasis on the use of mediation and alternative dispute resolution practices across the cluster.

In the Facilitator's view, the OMB's increasing use of early mediation will demonstrate within the cluster that mediation is generally appropriate and can be an invaluable tool, even where significant issues of public interest are engaged.

While mediation is not appropriate in every case, it should be favoured over adjudication. An initial screening to determine whether mediation is appropriate should form part of regular case management.

Resolution by mediation will produce outcomes which more closely meet the particular needs of the parties. Mediation permits more efficient use of scarce tribunal and party resources than litigation.

To the extent that any of the Tribunals are unable to incorporate an enhanced reliance on early mediation following the path now set by the OMB, the Facilitator recommends that this issue be revisited within the cluster before the end of the 2008 calendar year.

15. Regular Meetings of Adjudicators

The Tribunals all have regular meetings of adjudicators to discuss issues of law, policy and practice.

This initiative is completed.

16. Common Community Advisory Committee

The Facilitator recommends that this is a long-term goal, to be deferred until such time as the cluster has developed a consistent and regular community of users and a distinct identity. This initiative should be revisited as a topic for discussion at a future date.

7 SUMMARY AND CONCLUSIONS

The Agency Cluster Project has presented a unique opportunity to group together tribunals that operate in similar and related sectors to make the best use of common, resources while strengthening the quality, consistency and accessibility of public services.

This exercise has provided an opportunity to identify best practices that already exist and to jointly collaborate on new ones. Co-location is an essential first step. This change alone will significantly increase opportunities for interaction between the Tribunals. This, in turn, will permit greater exploitation and use of the full range of knowledge, skills and expertise inherent within the cluster. Increased emphasis on the use of early mediation as an alternative to the traditional hearing model is a significant and critical new step. These changes will help achieve a number of "modern" best practices. Implemented as a whole, this range of initiatives will culminate in continuous service improvement and adjudicative excellence.

Throughout the consultation process and in working with the Tribunals, the Facilitator has attempted to ensure that this exercise is not, and is not perceived to be, the integration or merging of separate Tribunals into one. The preservation of tribunal independence, expertise and individual mandate has remained at the core of the exercise.

Of equal importance is that this initiative is not a cost cutting exercise. The intention is to create a set of Tribunal relationships that result in a more effective use of existing resources.

The initiatives set out in this report represent an action plan that, once fully realized, will meet the mandate established for the Agency Cluster Project and will position these particular Tribunals at the forefront of a modernized administrative justice system in Ontario.

In the Facilitator's view, the success of the project would and did turn on the information and focused feedback provided by those who know best about the work of a tribunal – the staff and appointees themselves and their user groups.

The essence of the work has been to identify, in a nuanced way, those practices which can be done more effectively in a coordinated and shared way, while at the same time ensuring that this sharing does not jeopardize or imperil individual tribunal independence or expertise. These outcomes could not have been achieved without the views and thoughts of those who work in and with the Tribunals.

The Facilitator would particularly like to thank the Tribunals and their Chairs for their contribution to and participation in this important project.

The Facilitator would also like to thank all of the institutions and individuals who participated in the consultation process, both through informal discussions and formal written responses to the Interim Report.

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